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The Concept of Voluntariness

Action, Knowledge, and Will contains a wealth of original ideas and arguments, organised around a guiding thought: that human agency has four dimensions: physical, psychological, ethical and rational (4). Against this framework, Hyman shows that many disagreements, confusions or mistakes about human agency result from conflating these dimensions. Though the approach yields many important insights, in this commentary I shall focus on an issue where I think the strategy is less successful: Hyman's original and thought-provoking discussion of the concept of voluntariness, which he says belongs in the ethical dimension of agency.

I shall first outline Hyman's central claims about voluntariness (§1), and assess his arguments (§2), which focus on duress (§2.1) and obligation (§2.2). My conclusion will be that, although Hyman's discussion of the relationship between duress and exculpation is persuasive and illuminating, his claim that voluntariness is at root ethical concept whose basic function is to assess innocence and guilt is unconvincing: the concept of voluntariness has a wider scope than that characterization suggests.

§1 Hyman on Voluntariness and Choice

One of Hyman's core claims is that 'voluntariness is at root an ethical concept' whose basic function 'is to inform the appraisal of individual conduct and in particular the assessment of innocence and guilt' (76). According to him, an act is done voluntarily

if it is *not* due to ignorance or compulsion and the point of saying that an act is not due to ignorance or compulsion is that these are both normally exculpations, factors that excuse someone from blame (5).¹

He expresses the same idea as follows: 'the concept of voluntariness is formed by negation, in fact by double negation, by excluding factors that exculpate, in other words, factors that exclude guilt' (77). And he adds, further, that it is not just that the concept turned out to be useful for assessing culpability; rather, the concept was 'designed for this purpose. That is what I mean by saying that voluntariness is at root an ethical concept' (77).

There are several explicit claims one might distinguish here:

- [1] The concept of voluntariness is 'at root' an ethical concept.
- [2] The concept of voluntariness is formed by negation, in fact by double negation, by excluding factors that exculpate, in other words, factors that exclude guilt.
- [3] A concept is an ethical concept if its *basic* function is to inform the appraisal of individual conduct and in particular the assessment of innocence and guilt.
- [4] The concept of voluntariness was designed for this [ethical] purpose.

¹ Ignorance and compulsion may fail to exculpate in some circumstances. For reasons of space, I leave aside this complication. I shall also focus on compulsion rather than ignorance for the most part.

What is the relation between these claims? As I understand them, claim [1] is supported by [2] and [3], as follows. [2] says that the application of the concept of voluntariness to someone's doing, failing to do, undergoing something, etc. (from now on, 'an act')² is constrained by two factors: ignorance and compulsion, so that an act is voluntary if it is not due to ignorance or compulsion and, vice-versa, since both factors negate voluntariness. Why should factors such as ignorance and compulsion dictate whether the concept of voluntariness applies to an act? Because the basic function of the concept of voluntariness is to assess innocence and guilt, and ignorance and compulsion are factors that exclude guilt. So if an act is due to either ignorance or compulsion, then the act was not voluntary and the agent is exculpated. And that shows that the basic function of the concept is to appraise individual conduct in relation to innocence and guilt [3]. Therefore [1] is true: the concept of voluntariness is at root an ethical concept.³

Choice and voluntariness

Hyman also notes that 'traditionally voluntariness is associated with choice', so that 'it is natural to think that a person does something voluntarily if and only if he chooses to do it, or could choose not to do it. If he has a choice whether to do it' (81) – and, he adds: 'I shall say that a person has a choice whether to ϕ when he can choose to ϕ and can choose not to ϕ ' (ibid.). Hyman doesn't reject this view directly but says that 'the relation between doing something voluntarily and having a choice whether to do it is not straightforward' (99). This is partly because, he says, 'the word 'choice' can express more than one idea:

the theoretical idea of an alternative the agent was 'literally able to choose', and the practical idea (...) what Hart and Honoré call a 'real choice' (...) — in other words, an alternative that meets an appropriate standard of eligibility, because it does not conflict with a binding obligation or because it is not too high a price to pay (92).

According to Hyman, the voluntariness of an act may be negated by compulsion which, while not removing literal choice, removes 'practical choice'. Whereas what I shall call 'the literal choice' view of voluntariness holds that it's not the lack of practical choice but rather the lack of literal choice that negates voluntariness. On this view, practical compulsion often exculpates and it does so because it qualifies the voluntariness of an act – but it does not negate it altogether. Hyman offers a series of arguments intended to vindicate his account of voluntariness against the literal choice view, to which I now turn.

§2. Hyman's Arguments

Hyman argues that 'the scope of compulsion encompasses cases in which a person is compelled to do, not do, or undergo something by an obligation or a threat' (97), so that in those cases the agent often acts involuntarily and may, if the right conditions apply, be exculpated because of the compulsion under which he acts. I examine some of those arguments below.

² It would be more accurate to use the term 'doing' as the generic for a doing, not-doing or undergoing something because, unlike 'act', 'doing' doesn't imply agency. However, 'act' is often appropriate for my purposes and I shall use it unless the context requires something else.

³ I leave aside [4] which, on the face of it, appears to be a historical claim about the development of the concept of voluntariness, because the truth of [1]-[3] seem independent of the history of the concept.

Voluntariness and duress

Hyman notes that in law duress ‘is generally regarded as a species of necessity, its distinguishing feature being that the circumstance that compelled the defendant to commit the act consisted in a threat by another person’, and he adds that ‘the courts have on the whole restricted the plea of duress to threats of death or serious personal injury to the defendant or someone closely associated with him’ (81). With this characterization in the background, Hyman identifies an ‘antinomy about duress’. On the one hand, when someone does something under duress, there seem to be good reasons to think that his act is not voluntary. For instance, when a person hands over his wallet because he’s threatened with a knife it seems wrong to say that he handed it over voluntarily. On the other hand, as Hart and Honoré note, ‘the person threatened is literally able to choose whether to act as instructed or suffer the threatened harm, so that a choice exists’ (82). And this suggests that threats ‘influence but do not *abolish* choice, and therefore do not negate voluntariness’ (ibid.).

Hyman’s solution to the antinomy is to concede that the person who acts under duress was ‘literally’ able to choose but to deny that it follows from that that his act was voluntary. This is because, he claims, compulsion that falls short of removing the literal possibility of choice can exculpate and negate voluntariness.

The defence of this solution proceeds via an examination of voluntary passivity, focusing on a type of rape case where the rapist threatens the victim ‘with violence and she makes a conscious decision to submit’ (89) because she judges resistance to be too dangerous. We may accept that the woman ‘literally’ has a choice: she could have chosen the risk of violence. If so, Hyman argues, the literal choice view entails that the woman consented to the sex act and submitted voluntarily. But, he goes on, such an idea ‘is repugnant and absurd’ and moreover ‘it cannot be right because by definition, rape is sexual penetration that is “not truly voluntary or consensual on the part of the victim”’ (ibid.).⁴ Moreover, he adds, if the literal choice view were right, ‘it would be a defence against a charge of rape that the victim was “literally able to choose whether to act as instructed or suffer the threatened harm”’ (ibid.).⁵ And this shows that an act may be due to choice, in the literal sense, and yet be involuntary because it was ‘practically necessitated’, since the agent acted under duress.

How decisive is this argument? First, arguably, the literal choice view is consistent with the claim that a coerced sex act like the one described above qualifies as rape. This is because the act described is not ‘truly voluntary or consensual on the part of the victim’: although the victim consented to submit, unlike in cases where the victim is physically overpowered, her consent was invalid, since her decision to submit was coerced, being due to the threat of violence. And, since the consent was invalid, because valid consent requires free, non-coerced agreement, the offender’s act constitutes rape. This would undermine Hyman’s point that, on the literal choice view, there would be a defence against the charge of rape on the grounds that the victim was literally able to choose not to submit. As he says, it would indeed be repugnant and absurd to say that the victim consented, if that was construed as implying

⁴ As ‘identified in a comparative study by a UN Criminal Tribunal as “the basic underlying principle” in the law of rape, in the various legal systems surveyed’ (Hyman, 2015, 89).

⁵ Though it has been thought such a defence. Alan Wertheimer notes the following entry from *Black’s Law Dictionary*:

If she consents to the sexual intercourse, although that consent may be reluctantly given, and although there may be some force used to obtain her consent, the offense cannot be ‘rape’ (4th edition, 1951, 1,427).

Wertheimer adds that ‘we have and should move’ towards ‘a conception of sexual offense that is based on the absence of valid consent rather than the presence of force’ (2003, 12).

that she engaged in consensual sex. But the literal choice view is not committed to that: since the consent was invalid, the sex was not consensual.

But is it absurd to say that the woman submitted voluntarily? It is not clear that it is, for it seems plausible to follow what Aristotle says in *NE* 3.1 (11110a, 4ff.): that some acts are ‘mixed, but are more like voluntary actions’; they are mixed because in the abstract, that is, independently of the circumstances in which they are done, ‘no one would choose such an act in itself’;⁶ but ‘now, and in return for these gains’ they are chosen for the end they serve – in this case avoiding violence or death, which makes them voluntary.⁷ And therefore, the defender of the literal choice view may say that if a person is ‘literally able to choose’ then, although she may be compelled to act as she did by a serious threat, her action was voluntary rather than involuntary, though the voluntariness is qualified.

On this way of resolving the antinomy, the fact that an act is due to choice (in the literal sense) is sufficient to make it voluntary. The fact that the agent acts under duress makes it, however, mixed voluntary, and the duress explains why the act is exculpated, since the choice is constrained in ways that exculpate.

So we have two ways of resolving the antinomy. One says that duress exculpates because it negates voluntariness, even though the agent had a (literal) choice. The other says that duress exculpates because it qualifies voluntariness (it makes the act ‘mixed voluntary’), but it does not make it involuntary, since the agent had a (literal) choice. How are we to choose between the two? It may help us decide to see the verdicts Hyman position yields in other cases where agents are faced with unpalatable choices.

Hyman accepts a point made by Hart and Honoré that ‘if a man hands over his wallet because he is threatened with violence we would normally accept that he was forced to do so, whereas if he hands over strategic plans to the enemy for the same reason we might not’ (89). And he adds ‘hence, deciding whether a person’s conduct was voluntary can involve making a value-judgement’ (ibid). It follows from this, together with Hyman’s account of voluntary acts, that while the first man hands over his wallet involuntarily, the second man hands over the strategic plans voluntarily, since his act was not due to compulsion. But this seems wrong. And, while we may agree that it is ‘reasonable to demand the degree of heroism of [the second man] that resisting would require’ (99), so that we may criticize him, but not the first man, for lacking courage, and that his plea of duress might be rejected in court, it is less clear that we should accept that this difference in value judgement implies a difference in the voluntariness of the acts of the two men. It seems plausible to say that the second man acted voluntarily because he could have resisted the threat; but then, we ought to conclude that the first man also acted voluntarily, since he also could have resisted. The fact that the second man *ought* to have resisted, while this is not true of the first, does not seem to affect this point, though it affects our judgements about their guilt. This, if right, undermines Hyman’s claim that the compulsion of duress, which applies only to the first man, negates voluntariness, even if he’s right that it can exculpate.

Second, the account is also unsatisfactory when one considers unpalatable choices that don’t result from other people’s threats. Consider the case of a businessman who fires some of his employees because it is the only way to avoid bankruptcy and destitution, even though this will cause some of his employees some serious harm (*they* will be destitute). Should we conclude that he fires them voluntarily or involuntarily? His act is clearly not literally

⁶ In this case, submitting to a sex act with a man one doesn’t want to have sex with.

⁷ Hyman considers the Nicomachean position (87-91) but rejects it, using the rape example discussed above to argue against it. However, for the reasons given, I don’t think his arguments are convincing.

compelled. Is it practically compelled? Well, he cannot plea duress, as the courts understand it. If so, it would seem that he fires them voluntarily.⁸ But this again puts pressure on Hyman's verdict that the man with the wallet does not act voluntarily, for it seems arbitrary to treat the cases differently given that both act under grave practical necessity: why should the fact that in one case the threat originates in someone else's will and involves death or violence matter for whether the act is voluntary? The alternative, that he acted involuntarily, conforms with the suggestion that he did not have a practical choice, since the alternative was 'too high a price to pay'. However, that would open the floodgates, for many of our choices are made under this sort of practical necessity and it seems wrong to say that they are all things we do involuntarily. For instance, if Jim, who loves smoking, gives up smoking because the alternative is a high risk of lung cancer, the verdict would have to be that he gave up involuntarily, since he had no practical choice: the alternative was too high a price to pay. But this seems implausible. The suggestion that these sorts of acts done when one has 'no practical choice' are all voluntary, but some are 'mixed' voluntary, seems to capture better that intricacy of these cases.

Voluntariness and obligation

Hyman's treatment of the relationship between obligation and voluntariness is also problematic. First, there is tension in Hyman's criteria. On the one hand, he says that 'if one does in fact have an obligation to do something, and this is one's whole reason for doing it, then one does not do it voluntarily' (96) and the reason is that 'to acknowledge that one has an obligation to do something is precisely to think of it as compulsory, non-optional, so that whether one does it is *not* a matter of choice' (96). This suggests that accepting one has an obligation is sufficient to remove choice and hence voluntariness. On the other hand, he holds that 'if someone does what he has an obligation to do (...) for his own reasons, without accepting that he is obliged to do it, he does it voluntarily, out of choice' (97). This suggests that not accepting that one has an obligation to do something is necessary for doing it voluntarily. But then Hyman also says that 'parents are typically motivated by the desire to care for their children, rather than the desire to fulfil their obligation to care for them' (96) and so they care after their children voluntarily. This, however, creates a problem because many of these parents also accept that they have an obligation to look after their children. If accepting that one has an obligation removes (practical) choice, and if voluntariness requires not accepting the obligation, it is hard to see how Hyman criteria can yield the plausible verdict that the parents in question look after their children voluntarily, out of choice.

Second, the idea that doing something motivated only by obligation implies that one does it involuntarily does not seem plausible. Suppose that I promise to help you move house and thus place myself under an obligation to do it. But suppose, also, that when the moment comes, I'm tired and busy and don't feel like helping you but reflect that I have an obligation to help you and act motivated by that thought alone. According to Hyman, if my whole reason for helping you is the obligation, I help you involuntarily. But as in the choices above, I find that verdict unconvincing – it seems more plausible to say that I help you voluntarily though perhaps out of a sense of duty rather than anything else.

Conclusion

⁸ I am assuming that he has no obligation to fire them which motivates him to do so for, otherwise, according to Hyman, he would fire them involuntarily.

What should we then conclude about Hyman's claims about voluntariness [1]-[3] outlined above? I think Hyman's discussion of the relationship between duress, obligation and exculpation is persuasive and illuminating: he succeeds in showing that exculpation, both in the law and outside of it, often depends on whether the agent acted under certain forms of compulsion, and that these often involve value judgements. This is not surprising, since whether we exculpate someone is likely to depend on what they did, what alternatives they had, and why they chose the alternative under assessment. By contrast, his claim that the application of the concept of voluntariness shifts with these judgements is less persuasive. First, even if there is a precise and agreed definition of what constitutes duress in legal contexts, so that only factors that meet that definition are admitted as legal excuses, it is not clear that our ordinary judgements about voluntariness track those exculpations. And, as the examples of other unpalatable practical choices and the discussion of obligation suggest the same seems true for those phenomena. It may be that *a* concept of voluntariness whose application is purely dictated by evaluative questions relating to innocence and guilt might be particularly useful in law. But it is unclear that that is *the* concept of voluntariness. For it seems that we operate with a wider concept of voluntariness, where the sort of compulsion that negates it depends, not on evaluation, but on literal choice: on whether the act was within the agent's control. Such a concept has no doubt ethical uses, though these go well beyond questions of innocence and guilt. But it is doubtful that it is an ethical, as opposed to a psychological concept.

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